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No. 03-725

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IN THE

Supreme Court of the United States

DAVID B. PASQUANTINO,
CARL J. PASQUANTINO &
ARTHUR HILTS,

Petitioners,

v.

UNITED STATES OF AMERICA

Respondent.

On Petition for a Writ of Certiorari to the United States Court of Appeals for the Fourth Circuit

PETITIONERS' REPLY BRIEF

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PETITIONER'S REPLY BRIEF

I. The Government Fails In Attempting To Dismiss As Unimportant The Issue In This Case.

The government's Brief in Opposition seeks to minimize the importance of both the conflict below and the question presented. The government does not and cannot deny, however, that there is a direct conflict between the First Circuit, which held in *United States v. Boots*, 80 F.3d 580, *cert. denied*, 519 U.S. 905 (1996), that the federal wire fraud statute does not authorize prosecution of schemes to evade payment of taxes to foreign sovereigns, and the decisions of the Second Circuit and the Fourth Circuit, which have upheld such prosecutions. *See United States v. Trapilo*, 130 F.3d 547 (2d Cir. 1997); *United States v. Pasquantino*, 336 F.3d 321

(4th Cir. 2003) (en banc). The government's arguments as to why this conflict is unimportant do not withstand scrutiny.

First, the government asserts that *Boots* was wrongly decided, and suggests that if presented with the question again today, the First Circuit might change its ruling in light of the decisions of the Second and Fourth Circuits. Opp. at 8-9. The government points to no statement in any subsequent First Circuit case in the eight years since *Boots* to suggest that the court is considering such a step. That the reasoning of *Boots* cannot be rejected out of hand is illustrated by the fact that the original Fourth Circuit panel in the present case adopted the same reasoning, *see* Pet. at 39a-50a, and the en banc panel that rejected *Boots* did so over a spirited dissent, *see id.* at 27a-37a. The Eleventh Circuit has also adopted the reasoning of *Boots*. *See Republic of Honduras v. Philip Morris Cos. Inc.*, 341 F.3d 1253, 1256 (11th Cir. 2003).

As this Court emphasized in *Cleveland v. United States*, 531 U.S. 12 (2000), properly limited construction of the mail and wire fraud statutes is especially important because of the role that these offenses play in defining the additional federal offenses of racketeering and money laundering. *See* 531 U.S. at 25. The government regards as irrelevant to the question presented cases addressing the impact of the revenue rule in the context of RICO cases that are predicated on mail or wire fraud. *See* Opp. at 10-11. The issue in this case, however, concerns the proper interpretation of the mail and wire fraud statutes, and there is no basis for interpreting these statutes differently when they serve as predicate offenses for a RICO claim than when they are enforced directly through criminal prosecution. *See Attorney General of Canada v. R.J. Reynolds Tobacco Holdings, Inc.*, 268 F.3d 103, 138-40 (2d Cir. 2001) (Calabresi, J., dissenting). Cases addressing the application of the revenue rule to RICO claims are therefore very much part of the conflict of authority below, and are part of the doctrinal disarray that this Court should resolve.

Finally, the government asserts that the question presented lacks "sufficient recurring importance." Opp. at 9. In contrast, the prosecutor made the opposite representation to the Fourth Circuit in this very case, asserting that the wire fraud statute is now "the primary legal tool in the United States" to combat smuggling from the United States into foreign countries. United States' Petition for Rehearing En Banc at 7, *United States v. Pasquantino*, 336 F.3d 321 (4th Cir. 2003) (Nos. 01-4463, 4464, 4465). As the government continues to use this tool, cases relating to the applicability of the revenue rule will continue to arise, and defendants will be imprisoned in the Second and Fourth Circuits on charges that should not be brought.[1] In addition, foreign sovereigns will continue to ask U.S. courts to justify their refusal to allow civil RICO recovery of monies that these same courts have held to constitute wrongfully taken property.[2] Given the thoroughness with which the relevant issues have been vetted by the four appellate courts to have addressed the question presented, *see* Pet. at 11-18, there is nothing to be gained and much to be lost by postponing resolution until a later day.

II. The Government's Position Conflicts With Congressional Enactments Concerning Enforcement Of Foreign Customs And Revenue Laws.

The government's Brief in Opposition fails to recognize Congress's interest in regulating foreign affairs. Each time Congress has enacted legislation addressing the country's

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[1] *Cf.* Deborah Sprenger, Effect Upon Prior Convictions Of *McNally v. United States* Rule That Mail Fraud Statute (18 U.S.C.A. § 1341) Is Directed Solely At Deprivation Of Property Rights, 97 A.L.R. Fed. 797 (2004) (documenting "wave of collateral attacks" unleashed by holding in *McNally v United States*, 483 U.S. 350 (1987), that schemes to defraud someone of intangible rights do not fall within the mail fraud statute).

[2] *See, e.g., European Community v. RJR Nabisco*, 355 F.3d 123 (2d Cir. 2004) (reaffirming view that foreign sovereigns are barred from bringing civil RICO suits to recover tax revenue lost to fraud).

interests in enforcing foreign revenue and customs laws, Congress has taken a measured approach that balances the country's interests in protecting its own citizens and in obtaining cooperation from foreign sovereigns for U.S. law enforcement efforts. *See* Pet. at 18-22 (discussing the Revised Protocol With Respect To Taxes, U.S.-Canada, art. 15, S. Treaty Doc. No. 104-4 ("Protocol") (providing that "no assistance shall be provided" with regard to Canadian revenue claims against persons who are U.S. citizens when the tax liability is incurred), and 18 U.S.C. § 546 (providing that the government may prosecute smuggling of goods into a foreign country only if that country has a reciprocal law, and limiting any sentence to no more than two years imprisonment).

The government fails to address the Protocol at all, suggesting that the government can think of no way to reconcile the prosecutions at issue in this case with the dictates of the Protocol. With regard to section 546, the government asserts that it is free to prosecute violation of foreign customs laws either under the statute directly addressing them or under the wire fraud statute, on the ground that, "[w]hen conduct violates more than one statute, the government may proceed under either." *See* Opp. at 12. In taking this position, the government begs the question. *If* the wire fraud statute were applicable to evasion of foreign tax revenue, then the Executive might indeed be free to proceed under either provision. Here, however, the question is whether the mail and wire fraud statutes *should* be interpreted in a way that renders section 546—which was enacted on the same day as the mail fraud statute[3]—largely superfluous. This Court has long recognized as "familiar law" that "a specific statute controls over a general one without regard to priority of enactment." *Bulova Watch Co. v. United States*, 365 U.S. 753, 758 (1961) (citations omitted).

[3] *See* Act of June 25, 1948, c. 645, 62 Stat. 717 (codified as amended at 18 U.S.C. § 546), 763 (codified as amended at 18 U.S.C. § 1341).

Here, the government seeks to avoid the limitations contained in a specific statute by relying on a general one—even though such an interpretation conflicts with the revenue rule.

The government engages in similar question-begging when it asserts that criminal wire fraud prosecutions raise no separation-of-powers issues, because they are brought by the Executive Branch and can therefore be assumed to further the "foreign relations interests of the United States." Opp. at 10. Again, this is true only if Congress has not dictated a contrary policy. Congress, however, has granted no express authorization for the prosecutions at issue in this case, and the government's enforcement efforts conflict with those treaty and statutory provisions in which Congress has embodied its views as to the "foreign relations interests of the United States" in this area. Any presumption that executive acts further the foreign relations interests of the United States is at least called into question when those acts circumvent policies adopted pursuant to the legislature's own constitutional power to regulate foreign affairs. *See* U.S. Constitution, Art. 1, sec. 8 (giving Congress the power to regulate commerce with foreign nations); *id.* at Art. 2, sec. 2 (requiring that treaties be made with consent of Senate).

III. The Government Errs In Asserting That Petitioners' Position Is Meritless.

Much of the government's brief is addressed to the merits of the Fourth Circuit's judgment, rather than whether the question presented is an important one that this Court should resolve. To the extent that the merits are relevant, the government's arguments are not persuasive.

A. Tax Obligations Owed To A Foreign Sovereign Do Not Constitute "Money Or Property" At Common Law.

The government concedes that "Congress legislates against the backdrop of well-established common law rules." Opp. at

6-7. It misstates, however, the nature of the inquiry this principle calls for in the present case. The mail and wire fraud statutes apply only to schemes to defraud someone of "money or property." *See McNally v. United States*, 483 U.S. 350, 360 (1987). These statutes do not provide any specialized definition of the term "property," which is a quintessentially common law concept. The proper question, then, is whether, at the time the mail and wire fraud statutes were enacted, tax obligations owed to foreign sovereigns fell within common law rules defining "property."

The government has effectively conceded the answer to this question as well, by acknowledging that under the revenue rule, "the courts of one sovereign will not enforce the tax judgments or unadjudicated tax claims of another sovereign." Opp. at 7 (citations omitted).[4] This is tantamount to an admission that tax obligations owed to a foreign sovereign are not the same thing as "money or property" under common law. If they were, common law would perforce permit a foreign sovereign to recover the sums owed to it through an action in the courts of this country. *See, e.g.*, *The Sapphire*, 78 U.S. 164, 167 (1870) ("A foreign sovereign . . . who has a demand of a civil nature against any person here, may prosecute it in our courts."); *see also* Restatement Third of the Foreign Relations Law of the United States § 481 ("Except as provided in § 482, a final judgment of a court of a foreign state granting or denying recovery of a sum of money . . . or determining interests in property, is conclusive between the parties, and is entitled to recognition in courts in the United States.").[5] The revenue rule embodies an

[4]The government's formulation of the revenue rule differs significantly from that of the Fourth Circuit, which held that the revenue rule applies only to enforcement of "judgments." Pet. App. 11.

[5]The revenue rule is not one of the exceptions to this principle contained in § 482 of the Restatement, but is contained in a separate section of its own, § 483. This corroborates the view that "judgments for

understanding that the obligation to pay taxes is of a different nature from the common law obligations to restore converted property or to pay contractual debts. While the latter obligations stem from common law principles governing relations between private parties, the former stems from an assertion of foreign sovereign power that may be given domestic force only pursuant to treaty or express legislation.

Indeed, the government in this case has not treated Canada as holding a property interest. Although the Mandatory Victims Restitution Act requires victims of wire fraud to receive restitution,[6] the government recognized that such an award was "not appropriate in this case since the victim is a foreign government and the loss derives from [foreign] tax laws." *See* Govt's Statement of Facts and Applicable Sentencing Factors at 3 (Feb. 16, 2001).

B. Cases Upholding The Use Of The Wire Fraud Statute Against Domestic Tax Fraud Do Not Decide The Question Presented.

The United States cites to a number of recent cases in which federal courts have allowed mail or wire fraud prosecutions against defendants who engaged in schemes to defraud the federal government or a State of tax revenue. Opp. at 6. These cases do not implicate the revenue rule, and do not undermine Petitioners' argument. Obviously, the revenue rule does not apply to federal courts when they recognize and enforce tax obligations imposed by the federal

the collection of taxes . . . rendered by the courts of other states" are not merely a subset of the class of "judgments for money or property," but are rather attempts to enforce political obligations whose nature is different from the common law obligation to render up the wrongfully detained money or property of another.

[6] *See* 18 U.S.C. § 3663A(c)(1)(A)(ii) (mandating restitution for any "offense against property under this title); *United States v. Coriaty*, 300 F.3d 244, 252 (2d Cir. 2002) (restitution mandatory for wire fraud).

government. There was, on the other hand, a period when certain State courts had invoked the revenue rule in refusing to enforce tax judgments from other States. *See, e.g., Colorado v. Harbeck*, 133 N.E. 357 (N.Y. 1921). In *Milwaukee County v. M.E. White Co.*, 296 U.S. 268 (1935), this Court held that the Full Faith and Credit Clause overrides the revenue rule with respect to relations between the States, given that the purpose of this clause was "to alter the status of the several states as independent foreign sovereignties . . . and to make them integral parts of a single nation." 296 U.S. at 276-77. Under these circumstances, "no state can be said to have a legitimate policy against payment of its neighbor's taxes[.]" *Id.* at 277. The policy reasons behind the revenue rule thus have no application in the domestic context. There is no dispute in this case that Petitioners paid all domestic taxes.

C. The United States Misconstrues Petitioners' Reliance On *Cleveland*.

Given that federal and State tax obligations *are* enforceable in federal courts, it is not surprising that some federal courts have assumed such obligations to fall within the definition of "money and property" under the mail and wire fraud statutes. *See* Opp. at 6 (citing cases decided prior to this Court's decision in *Cleveland v. United States*, 531 U.S. 12 (2000). This assumption is likely to face considerable scrutiny in light of *Cleveland*. Petitioners' position, however, does not require a determination of this issue.

Contrary to the government's suggestion, *see* Opp. at 11, Petitioners have not invoked *Cleveland* to suggest that tax obligations are categorically outside the scope of "property" under the mail and wire fraud statutes. Rather, the importance of *Cleveland* is its enunciation and illustration of the following three principles, which bear on the question whether taxes owed to a *foreign sovereign* should be regarded as "property": (1) Only a government's "interests as property

holder" are protected by these statutes, and to qualify as "property," an interest must fall within "the traditional concepts of property" while in the hands of the state. *See Cleveland* at 24-27. (2) In making this determination, a federal court is called upon to examine the legal sources giving rise to the government's interest and the purposes served by it. *See id.* at 20-25. (3) Because of the rule of lenity, and the fact that the mail and wire fraud statutes define the federal crimes of racketeering and money laundering, the scope of "property" in these statutes is to be construed strictly, so as to apply in doubtful cases only where Congress has "spoken in language that is clear and definite." *Id.* at 25 (citation omitted).

As discussed above, the revenue rule's denial to foreign sovereigns of the most basic property right of all—the right to recover one's property when wrongfully withheld—precludes a finding that foreign tax obligations satisfy the first of these three principles. Further, it is largely to avoid the kind of inquiry illustrated by the second principle that the revenue rule excludes foreign tax obligations from enforcement as property rights.[7] Finally, given that Congress showed no evidence of a wish to override the revenue rule in enacting

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[7] *See, e.g., Moore v. Mitchell*, 30 F.2d 600, 604 (2d Cir. 1929) ("No court ought to undertake an inquiry which it cannot prosecute without determining whether [foreign laws] are consonant with its own notions of what is proper.") (L. Hand, J., concurring). In this case, Petitioners were convicted without any evidence that their conduct violated Canadian law at the relevant time. Nor was there any evidence on the question of whether any potential tax obligation had achieved the status of property under Canadian law. Indeed, Petitioners' convictions were based in part on violation of a *sales* tax, *see* Opp. at 2, 3, not just an importation tax, without any evidence that Petitioners intended that Canadian sales tax not be paid. Pet. App. 54a-56a. This is more than a mere fact-based issue, Opp. at 12, as the Second Circuit held in *United States v. Pierce* that evidence of the relevant tax law allegedly violated is required. 224 F. 3d 158, 166 (2d Cir. 2000).

the wire and mail fraud statutes, the third *Cleveland* principle weighs against interpreting it to do so. Thus, whatever implications *Cleveland* may have for the use of these statutes to combat domestic tax evasion, it argues strongly against allowing their use to prosecute schemes involving non-payment of taxes to foreign sovereigns.

CONCLUSION

For the foregoing reasons, as well as those presented in the Petition and in the amicus brief of the National Association of Criminal Defense Attorneys and National Association of Manufacturers, Petitioners respectfully urge the Court to grant a writ of certiorari.

Respectfully submitted,

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